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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 293

JOSEPH G. WENNING,

Petitioner,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

REPLY BRIEFS

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAKEVIEW 5-6581

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REPLY BRIEFS

In Reply to Briefs of Respondents.

PRELIMINARY STATEMENT.

All emphasis herein is supplied unless otherwise stated.

Two Reply Briefs are here presented:

I. Reply to "Brief in Opposition for Respondents": Lawrence M. Davis, Former Sheriff of Mercer County,

Ohio; Ralph J. Ahlers, Former Deputy Sheriff of Mercer County, Ohio; The Century Indemnity Company of Hartford, Connecticut and the United States Fidelity and Guaranty Company of Baltimore, Maryland.

II. Reply to "Brief for Respondents": The Peoples Bank Company of Coldwater, Ohio; John C. Weigel and Joseph Pleiman "In Opposition".

I.

REPLY TO BRIEF OF RESPONDENTS DAVIS, AHLERS, THE CENTURY INDEMNITY COMPANY, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

This Reply Brief will reply to the said Respondents' Brief in the order of the paging of their brief.

Page 2 of the Brief of Davis, et al.

(Under "Questions Presented" that the questions are:

(1) Whether "in absence of restraint by the Federal Court" a state foreclosure is subject to attack and

(2) Whether failure to appeal the state court's refusal to recall its writ of assistance does not make such refusal *res judicata.*)

We think these questions have been categorically decided by this Court:

(1) In *Kalb* v. *Feuerstein,* 308 US 433 where at page 436 this Court said:

> "No stay of the foreclosure or of the subsequent action to enforce it was ever sought or granted in the

State or bankruptcy Court",

and at page 440:

> "Congress intended to and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court",

and at page 443:

> "Because that State Court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions —were all without authority of law.",

and no less than sixteen times in that decision this Court declared that all actions of the state court while the farmer-debtor action was pending in the federal court were absolute *nullities, utterly void, of no effect.*

And (2) the suggestion that the refusal of the state court to recall its writ of assistance, not having been appealed, is *res judicata* was likewise answered in the negative by this Court in *Kalb* v. *Feuerstein,* 308 US 433. The opinion at 436 posed the questions before it as being whether the state court had jurisdiction and

> "if it did not, *whether its action in the absence of direct appeal is subject to collateral attack.*"

At page 438 this Court quoted *the State court opinion* where it had held:

> "No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the" [state] "circuit court is void." (So the state court had said.)

and this Court's answer to that position was at page 438 where it said:

> "the action of the Walworth County Court was not merely erroneous but was *beyond its power, void and subject to collateral attack.*"

Also at page 444 this Court said:

> "considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Therefore in place of the two "Questions Presented" as suggested by said respondents we suggest that they are beyond all cavil superceded by the simple Question: "Whether a state court may finally determine a federal question in a way conflicting with applicable decisions of this Court" as put at page 12 of the petitioner's Petition for Certiorari.

Page 3 of the Brief of Davis, et al.

(That the Federal Court in dismissing the farmer debtor petition "ordered that all stay orders heretofore entered thereunder be set aside and held for naught. Ex. C., folio 104-5, R. ")

We do not conceive that it can be even plausibly argued that such an order can be construed to mean any more than that upon its entry any "stay orders" theretofore entered were *then, not retroactively,* nullified. If a district court of the United States may *nunc pro tunc* make its order retroactively give life and effectiveness to state proceedings which the statute law of the United States and the decisions of this Court have declared "utter nullities, void, of no effect", then verily that district court has overruled the

Constitution of the United States, and the statutes of the United States, as adjudicated by this Court which that Constitution declared are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It never could have occurred to the "founding fathers" that an inferior *United States* court could by its order amend the Constitution and overrule the statutes of the United States and the decisions of this Court. We do not think the judge of the district court in his order ever contemplated that the phrase "set aside and held for naught" could carry more connotation that the present tense imports, namely that its order *speaks from its entry* and not from some long past date.

Since the opposition of the respondents must rest or fall upon their argument that, notwithstanding actions which when they occurred were "nullities, void, of no effect" (*Kalb* v. *Feuerstein,* 308 US 433), yet they nevertheless subsequently could be given life, beginning even as of the very date when they were "nullities, void, of no effect" by an *ex post facto* order entered ten months later, that argument is here examined to see what it is worth.

Under Section 75(o) the United States district court was given express authority "upon petition made to and granted by the judge, after hearing and report by the conciliation commissioner" to restore power to the state court to proceed in the foreclosure case while the *petition* under Section 75(a) to (r) of the farmer debtor was pending in the United States Court. *No such authority was ever sought or granted.* How then could the United States Court ten months later, *after all proceedings relating to the petition under Sections (a) to (r) had been fully completed and terminated* and while proceedings under another

statute, Section 75 (s), were pending, do what it had not been requested by petition to do pursuant to Section 75(o) and had not done?

Further this so-called "dismissal" by the federal court was erroneous as this Court declared, prior to *Kalb* v. *Feuerstein*, 308 US 433, in *John Hancock* v. *Bartels*, 308 US 180. In that case all proceedings had been completed under Section 75 (a) to (r) and the farmer-debtor filed his amended petition under Section 75 (s) which the United States district court dismissed upon motion of a secured creditor, all as in this *Wenning* case. This Court sustained the Appellate Court in reversing the district court and said at page 183:

> "We think that the District Judge failed to follow the *mandate of the statute* and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceedings to be reinstated."

And still further, under the Section 75(s) proceeding in the *Wenning* case the conciliation commissioner issued and served upon the state court judge, the sheriff and the Federal Land Bank a specific restraining order. See reference to that order in both state and federal courts at page 26 of the Petition herein, under date of March 7-9, 1938 and Ex. 20, 21, folio 76, 79, R. . That order was flagrantly disregarded before the so-called "dismissal." See the same page 26 of the Petition herein under date of March 12-14, 1938, Ex. 1, folio 1, R. . Ex. 16, folio 69, R. and at the same page the entry of October 10, 1938. Ex. C, folio 104-5, R. .

The essential and governing point is that nothing done by or in a state or federal court could change the imperative prohibitions of Sec. 75 (n) and (o), *Kalb* v. *Feuerstein*, 308 US 433. Consequently the dismissal of a farmer debtor proceeding could not make *valid* what was *void*.

UNLESS THIS WERE TRUE, THE WHOLE SCHEME OF THE STATUTE WOULD BE EFFECTIVELY DESTROYED and UNITED STATES STATUTES AND DECISIONS OF THIS COURT STULTIFIED by merely proceeding with a pending foreclosure despite the positive prohibitions making them nullities, of Sec. 75 (o) and the decisions of this Court in *Kalb* v. *Feuerstein,* 308 US 433 and in *John Hancock* v. *Bartels,* 308 US 180. SUCH DISREGARD AND DISRESPECT FOR LAW BY CREDITORS, JUDGES AND COURTS, STATE AND FEDERAL, WOULD INVITE DEFIANT LITIGATION BY CREDITORS in the hope that in a portion of instances farmer debtor cases would be subsequently dismissed, thus retroactively putting validity into what was in the most positive language of statute and decision declared to be NULLITIES.

This would also compel the farmer debtor to continue to defend himself and his property in the state foreclosure proceedings, *in spite of this Court's positive decree* in *Kalb* v. *Feuerstein,* 308 US 433, at the end of the opinion at page 444 that *"the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor."*

Page 4 of the Brief of Davis, et al.

(That *Kalb* v. *Feuerstein,* 308 US 433 is distinguishable from this *Wenning* case.)

1. Statement: That the Wisconsin court *confirmed* the foreclosure sale *While the farmer debtor petition* was pending but that the Ohio Court confirmed the sale after the farmer debtor *petition* was dismissed by the Ohio federal court which ordered all stay orders theretofore entered "set aside and held for naught."

Answer: a. The Ohio federal court did not dismiss the petition under Section 75 (a) to (r) for composition or extension but dismissed the case under the *amended petition under Section* 75 (*s*), a different statute, for a stay and redemption. All proceedings had been completed under Section 75 (a) to (r) and a new and different set of proceedings initiated for an entirely different purpose under Sec. 75(s).

b. No stay order was ever issued under the *petition* filed pursuant to Section 75 (a) to (r) and no word in the "dismissal order" purported to relate to the *petition* under Section 75 (a) to (r). No stay order was necessary under Section 75 (a) to (r) because Section 75 (o) mandatorily made *all proceedings* in the foreclosure court "nullities, void, of no effect." *Kalb* v. *Feuerstein,* 308 US 433.

c. The "confirmation" of foreclosure sale by the state court attempted to confirm what never existed. *Not only* were the "order of sale" and the "appraisement" "nullities, void, of no effect," because they were attempted while the *petition* under Section 75 (a) to (r) pended (See the Petition herein, page 25, entries in federal and state courts dated January 28, 1938. Ex. 3, folio 49, R. ; Ex. 12A, folio 63, R. ; Ex. 12 C, folio 65, R. ; January 31, 1938, Ex. 1, folio 1, R. . January 8, 1938, Ex. 1, folio 1, R.) *but also* the attempted sheriff's sale was held and reported in violation of the restraining order issued by the conciliation commissioner. See Petition herein, page 26, entries of March 7-9, 1938 in federal and state courts. Ex. 20, 21, folio 76, 79, R. . Entry March 12-14, 1938, Ex. 1, folio 1, R. , Ex. 16, folio 69, R. .

We believe it has been demonstrated at page 5 of this brief that the federal court could not restore life to proceedings and orders which were mandatorily "nullities, void of no effect" ten months before when attempted in

violation of Section 75 (o) and in violation of the restraining order issued and served out of the federal court.

2. Statement: That the judgment and decree of foreclosure to the Federal Land Bank was valid. Agreed, because no federal case was pending.

That when the Ohio Court "confirmed" the sale there was no federal case pending.

Answer: We are not certain that there was no federal case then pending because a petition for rehearing of the dismissal order was filed November 16, 1938 (See page 26 of the Petition herein, entry of November 16, 1938) and the "confirmation" was entered before that petition for rehearing was denied on January 11, 1939. See page 27 of the Petition herein. It is universally recognized law that an order which is the subject of a petition for rehearing is suspended in its effect until the petition for rehearing is disposed of. For instance: the time for appeal and certiorari in this matter ran from the date of the denial of rehearing by the Ohio Supreme Court.

2. Statement: That as the "confirmation" was entered when no federal case was pending therefore it was effective.

Answer: The Ohio Court could not by an *ex post facto* entry make an order of sale, and an appraisement, valid which were "nullities, void, of no effect" when attempted. A thing that is a nullity, void, of no effect, never existed at all. In Ohio no court has jurisdiction to hear a divorce petition until six weeks after service of summons. Query, if the court presumed to hear a divorce petition, the same day it was filed and entered a decree of divorce and distributed property, would any title be divested? No, because the attempted decree was a nullity, void, of no effect. Then suppose one of the parties filed a petition seeking

enforcement of the decree and after proper service the court, having jurisdiction, sought to punish for violation of the decree, which never existed! Likewise as to the "confirmation" of sale it is precisely the same as if the Ohio court never issued an order of sale and no appraisement was ever made. Then, query, if the Court would "confirm" the "sale" would any title be disturbed or transferred? No power can confirm what never existed.

In Ohio an order of sale is an absolute prerequisite to a sale in foreclosure.

> 24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17: "A judicial sale has its *very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act.* Furthermore, purchasers at a judicial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but *the order must be made prior to the sale.*"

4. Statement: That at no time while the federal court had exclusive jurisdiction did the Ohio court "make any orders or execute any entries with reference to this case. *Any acts performed with reference to this case between said dates, were performed by ministerial agents of the court, the sheriff and clerk.*"

Answer: *Kalb* v. *Feuerstein*, 308 US 433:

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court of Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of sale, *the execution of the sheriff's deed, the writ of*

assistance, and the ejection of appellants from their property—to the extent *based upon the Court's action were all without authority of law.*"

The sheriff (and of course the clerk) though "ministerial agents of the court" were held amenable to Section 75 (o) by its words:

"the following proceedings shall not be . . . maintained . . . *sale* . . . under any . . . *mortgage*"

and by Section 75 (p):

"The prohibitions of subsection (o) shall apply to all judicial or *official proceedings* in any court or under the direction of *any official* . . ."

Bottom of page 4 of the Brief of Davis, et al.

(That the case of *Union Joint Stock Land Bank* v. *Byerly,* 210 US 1 "was a case very much like the case at hand", citing also *Bernards* v. *Johnson,* 314 US 19, 32.)

Union Joint Stock Land Bank v. *Byerly,* 310 US 1 is not in any substantial way like this case. There the federal judge by his formal order in a case pending in his court under Section 75, expressly directed the state court to proceed with sale in foreclosure (on the creditor's plea that expense had been incurred in advertising it before the federal jurisdiction had been attached). This court recognized that such an order was erroneous, occurring within the exclusive power of the federal court, but hold that the state court was justified in taking it for granted that the federal judge knew federal law and that the sale could properly proceed pursuant to the order directed to it out of the federal court. It further held that the federal judge, though having POWER, granted in Sec. 75 (o), to authorize state court action in the pending foreclosure, had not pursued the proper procedure in granting it. Therefore, said the majority, the order of the district judge was er-

roneous and was subject to correction by review but it was not void because he had POWER to act.

Three justices vigorously dissented from that reasoning of the majority. The difference of opinion was restricted to the *method* by which the *federal judge* exercised his statutory POWER (in Sec. 75 (o)) to authorize the *state court* to hold the foreclosure sale. All agreed he had complete POWER to do so; he did it in a manner different from that prescribed. This was what the majority opinion said was merely *erroneous,* not void, and therefore it could not be corrected by collateral attack but only by review on appeal.

Even so the three justices (namely Justices Black, Douglas and Murphy) in their dissenting opinion of more than six pages, opened and closed their dissent with the statements (1) that the effect of the majority decision "would be largely to defeat the purposes of the Act" (page 11) and (2) that it provided "a ready means of circumventing the Act" (page 16).

Within a month after the divided court decision in the *Byerly* case, 310 US 1, decided April 22, 1940 it unanimously held in *Borchard* v. *California Bank,* 310 US 311, decided May 20, 1940, that where a federal judge in *three* formal orders failed to follow the statutory procedure laid down in Sec. 75, they were void and again this Court admonished the courts to obey and follow the "mandate of the statute". In the *Borchard* case no state court was involved and thus no excuse existed for saving the validity of the erroneous order upon the reasoning that a state court was justified in taking it for granted that a federal judge knew federal law, especially when the federal judge had POWER to do what he ordered but exercised that POWER in a method at variance with the statutory procedure.

The *Byerly* and *Wenning* cases differ in vital particulars. The *Byerly* sale was held by *express direction in an order of the federal judge. The federal judge had authority* (under Sec. 75 (o)) to issue the order to the state court to go ahead and sell but did not observe the statutory *procedure.* No order of any sort was sought or issued in this *Wenning* case by which the foreclosure sale could proceed. Likewise in *Kalb* v. *Feuerstein,* 308 US 433, no permission to foreclosure was sought or granted. No restraining order was sought or issued in the *Kalb* case, whereas restraining orders were served on the judge, the sheriff and counsel for the Land Bank in the *Wenning* case prior to the sheriff's purported sale. Ex. 20, 21 folio 76, 79, R. . See Petition herein at page 26, entries in federal and state court dated March 7-9, 1938.

The essence of the distinction between the *Byerly* and *Wenning* cases is that the *Byerly* procedure was held to be erroneous and voidable not void and not subject to collateral attack, while in the *Wenning* case the purported sale was not only without the essential prerequisite but in defiance of a restraining order and therefore void and subject to collateral attack.

The legal situation in the *Wenning* case is precisely like that *Kalb* v. *Feuerstein,* 308 US 433, with the added feature that there was a restraining order in the *Wenning* case and none in the *Kalb* case.

The citation to *Bernards* v. *Johnson,* 314 US 19, 32 supports the theory of the *Byerly* case, but neither lends any support to the theory that any order out of a federal court will *ex post facto,* and *nunc pro tunc,* validate orders and proceedings of another court which were when attempted, nullities, void, of no effect, where there was no permission either granted or sought upon which the state court might presume to act. Here, in the *Wenning* case not only was

there the statutory prohibition of Section 75 (o) depriving the state court of all power but there was also an express restraining order from the federal court served upon judge, sheriff and party.

Top of page 6 of the Brief of Davis, et al.

(That the defendant in foreclosure having directly attacked the validity of the orders and jurisdiction of the state court, and no appeal having been taken, there can be no collateral attack because of *res judicata.* Citing *Sunshine* v. *Adkins,* 310 US 381, 403, *Treinies* v. *Sunshine,* 308 US 66.)

Answer: In *Kalb* v. *Feuerstein,* 308 US 433, at page 439, the opinion observes:

> "Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities *subject to collateral attack.*"

And at page 444:

> "The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was *actually contested in the County Court,* or whethere it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

In citing the *Sunshine* cases (*Sunshine* v. *Adkins,* 310 US 381, and *Treinies* v. *Sunshine,* 308 US 66) the respondents resort to the confusion of somantics by taking the

word "jurisdiction" used in the sense of the judgment of a court within its POWER and transferring to it all of the connotations of the word POWER itself. The *Sunshine* cases were decided in 308 and 310 United States Supreme Court Reports during the same period and by the same justices who were handing down unanimous decisions that acts of a judge of a federal or state court when POWER had been taken from them by Sec. 75 were nullities. *John Hancock* v. *Bartels,* 308 US 180; *Kalb* v. *Feuerstein,* 308 US 433; *Borchard* v. *California Bank,* 310 US 311; *Wright* v. *Union Central,* 311 US 273.

The later of the *Sunshine* decisions was based upon *Stoll* v. *Gotleib,* 305 US 165 which was cited as a supporting authority in *Kalb* v. *Feuerstein,* 308 US 433 at page 444, in note 18. In that *Sunshine* case it was the definition of bituminous coal and in the *Gotleib* case the right of a creditor in a corporation debtor law proceeding, that is under Sec. 77B. In each instance (to the National Bituminous Coal Commission in one case and to the United States Court in the other case) there was granted POWER TO DEAL WITH AND ADMINISTER THE SUBJECT OF THE STATUTE. Within that power it was the duty of the Commission and of the Court to determine whether it had jurisdiction over a particular subject matter (bituminous coal or a class of creditors) and its decision was final unless reversed upon review.

In the earlier of the *Sunshine* cases the question was whether an Idaho state court's decision was *res judicata* in holding that the judgment of a court of a sister state was beyond the sister state court's jurisdiction. This Court held that the Idaho court had POWER to adjudge whether a court of a sister state had jurisdiction of the subject matter.

It is a legal maxim that "every court has the right to determine its own jurisdiction." But that maxim operates only within the area which comprises the court's POWER. If a court has no POWER, its judgment is void—a nullity. As this Court once said of itself "our most solemn proceedings can confer no right" and are *coram non judice. Voorhees* v. *Jackson,* 35 US (10 Pet.) 449, 474. For example an attempt by a United States District Court of a state to grant a divorce or to administer the estate of a deceased person, would be a nullity, even though it declared by most solemn judgment that it had such jurisdiction. The nullity follows from the fact that it has no POWER.

In *Kalb* v. *Feuerstein,* 308 US 433, the Wisconsin state court put the mortgagee in possession under a writ of eviction after a confirmation of foreclosure. Those acts of the state court were *never reviewed;* they were simply ignored because they were beyond the POWER of the state court due to Sec. 75 (n) and (o). In *Wright* v. *Union Central,* 308 US 502, two Indiana State Court decisions in foreclosure matters (and by courts of last resort at that) were also merely ignored because Sec. 75 (n) and (o) deprived all state courts of POWER. Decisions of the state courts that they had power in such circumstances were nullities because they had no POWER to act in any manner whatsoever.

It is submitted that all objections raised by the brief of respondents Davis et al. to the granting of certiorari have been fully answered and there is involved a state court decision contrary to the decisions of this Court, and the validity of federal and state laws raised as repugnant to the Constitution and laws of the United States, in spite of the petitioners claim of immunity, right, title and privilege specially set up and he has been deprived of his property without due process of law.

II.

REPLY TO BRIEF OF RESPONDENTS PEOPLES BANK, WEIGEL AND PLEIMAN.

This Reply Brief will likewise reply to the above named respondents in the order of the paging of their brief.

Since portions of the two briefs are substantially the same, this brief will not repeat arguments to the same points, but refer by page to their discussion in the preceding brief in reply to respondents Davis, et al.

Page 4 of the Brief of Peoples Bank, et al.

In the next to the last paragraph on page 4 of the Peoples Bank brief it is said that "The Court" [*i.e.* the United States District Court] "recited in its order that the possibilities of rehabilitation by the bankrupt were very remote." This reason for dismissal of a farmer debtor proceeding was overruled by this Court in *John Hancock* v. *Bartels,* 308 US 180. The United States District Judge had dismissed a farmer debtor proceeding which was pending under Section 75 (s) in an order like that in this *Wenning* case because, as this court said, at page 183:

> "He" [the District Judge] . . . "found that there was no reasonable probability of the debtor's financial rehabilitation"

at page 184 this Court in reversing the District Judge said:

> "The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor."

The Wenning dismissal by the federal court was of course erroneous for the same reason that the Bartels dismissal was erroneous.

Page 6 of the Brief of Peoples Bank, et al.

In paragraph (6) on page 6 of the Peoples Bank brief, it is said that

> "The subsequent ministerial acts in the state court case, such as the order of sale of January 31, 1938, and the sheriff's sale and report of sale did not effect the possession of petitioner, Wenning, nor his right to redeem".

Answer: The implied argument that "ministerial acts in the state court case" were not material or effected by the federal law has been answered at page 10 of the foregoing brief.

As to the statements on the same page 6 of the Peoples Bank brief that the order of sale, the sale and report of sale did not dispossess Mr. Wenning and that he had four and a half years of possession, the same argument was urged in *Kalb* v. *Feuerstein,* 308 US 433 and in *Wright* v. *Logan,* 315 US 139. In the latter case at page 142 of the opinion this Court in reversing the District Court said:

> "Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes."

and referred to *Borchard* v. *California Bank,* 310 US 311, where it had held likewise that petitioning farmer debtors were entitled to have the provisions of Section 75 observed as a "mandate of the statute."

The argument that Mr. Wenning could have redeemed up to the date of the court's "confirmation" of the void sale is requesting this Court to countenance litigants "sneak-

ing up" on their opponents in litigation in the hope of gaining an advantage later. That argument would stultify the statutes and decisions of this Court as discussed at page 7 of the foregoing Reply to the Davis Brief. Mr. Wenning was, and is, entitled to invoke his rights under Section 75 which are quite different to the "right to redeem" under the state law which was supplanted by Section 75 as held by this court in no less than fifteen decisions from *Wright* v. *Vinton,* 300 US 440, to *Wragg* v. *Federal,* 317 US 325.

The citations on the same page 6 of the Peoples Bank brief to *Union Joint Stock Land Bank* v. *Byerly,* 310 US 1, and *Bernards* v. *Johnson,* 314 US 19, 32, are discussed beginning at page 11 and ending at page 14 of the preceding brief.

The contention on the same page 6 of the Peoples Bank brief that *Kalb* v. *Feuerstein,* 308 US 433, is "distinguishable from the foreclosure proceedings in the *Wenning* Case" is fully answered in the preceding brief beginning at page 6.

Page 6 of the Brief of Peoples Bank.

(That a motion filed in the federal court for a rehearing of the dismissal order in the second farmer debtor case prior to the "confirmation" by the state court was ineffective to suspend the dismissal order and reliance again upon *Union Stock Joint Land Bank* v. *Byerly,* 310 US 1, 8.)

Answer: For the sake of argument let it be granted that the federal court dismissal order was effective before the state "confirmation" order.

Yet neither the dismissal order nor the entry of the "confirmation" could *ex post facto* go back eleven months

to an order of sale (void by statute), and nine months to a sheriff's sale (in defiance of a restraining order) and give them life as of the date when the *void* order and sale were attempted. The dismissal order could *speak only from its entry.* See page 5 of this Brief under the heading "Page 3 of the Brief of Davis, et al." where the theory here answered is fully discussed.

Page 8 of the Brief of Peoples Bank, et al., etc.

(That the defendant in foreclosure having directly attacked the orders of the state court and no appeal having been taken, there can be no collateral attack because of *res judicata.* Citing *Sunshine* v. *Adkins,* 310 US 381; *Treinies* v. *Sunshine,* 308 US 66; *Bernards* v. *Johnson,* 314 US 19; *Robertson* v. *Howard,* 229 US 254; *Wheat* v. *Texas,* 153 F. 2d 926.)

Answer: This contention, made also in the Davis brief, is fully answered beginning at the foregoing page 14.

As in the Davis brief, the Peoples Bank brief itself demonstrates that the judgment of the Supreme Court of Ohio is in direct conflict with the Constitution of the United States, the law of the United States and the decisions of this Court.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for Joseph G. Wenning, Petitioner.

Lima, Ohio
October 16, 1950.

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FILED
SEP 6 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

Appeal from
The Supreme Court of Ohio

Case No. 32075 in that Court

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; et al.,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF CERTAIN APPELLEES TO DISMISS APPEAL.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA KEVIEW 5-6581

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Procedure.

On July 25, 1950 certain of the appellees served upon counsel for respondent their motions under Rule 12, paragraph 3, to dismiss this appeal each being entitled "STATEMENT AGAINST JURISDICTION OF THE UNITED STATES SUPREME COURT AND MOTION".

This printed Brief of the Appellant opposing said motions is filed in this Court pursuant to Rule 7, paragraph 3.

Method of This Brief.

Henry J. Knapke, Esq., counsel for certain of the appellees, and Carleton E. Reiser, Esq., counsel for certain other of the appellees, filed separate motions to dismiss this appeal for want of jurisdiction which are in part identical in wording.

The last three paragraphs of the motion and statement of grounds filed by Attorney Knapke are identical in wording with the motion and statement of grounds supporting it filed by Attorney Reiser.

At this place this brief will answer the first part of Mr. Knapke's statement and then answer the identical portions.

PRELIMINARY STATEMENT.

For a clear comprehension of the issues over jurisdiction raised by the Statements and Motions of appellees and this Brief a recapitulation of the procedures may be helpful. Only so much is here set out as will suit the present purpose.

1. The laws of Ohio provide for foreclosure of a real estate mortgage in which an order of sale must be issued whereupon the real estate is sold as upon execution. GC of Ohio Secs. 11588, 11688.

2. Three distinct United States statutes are involved:
(a) Sec. 75 (a) to (r) of the Bankruptcy Act [Title 11, USC Sec. 203 (a) to (r)] enacted March 3, 1933, never held unconstitutional, providing for composition or extension

by agreement between a farmer debtor and his creditors, invoked by petition filed in a federal court, without any adjudication of bankruptcy as a farmer debtor.

(b) Sec. 75 (s) [Title 11, USC Sec. 203(s)], enacted June 28, 1934, invoked by the filing of an amended petition, providing, upon failure to reach agreement, for adjudication and for a five year moratorium, which was held to be unconstitutional in *Louisville* v. *Radford,* 295 US 555 on May 27, 1935.

(c) To take the place of the unconstitutional Sec. 75(s) a new Sec. 75(s) was enacted on August 28, 1935, also invoked by an amended petition, providing for adjudication as a farmer debtor and for a moratorium which was decided to be constitutional in *Wright* v. *Vinton,* 300 US 440, on March 29, 1937.

3. On September 7, 1934, a state foreclosure case, No. 12534, was filed against the appellant's farm real estate by the Peoples Bank, holder of a second mortgage. Ex. 1.

4. Thereafter on October 2, 1934 the appellant filed his petition as a farmer debtor in the federal court, Case No. 11200, under Sec. 75 (a) to (r) for composition or extension. Ex. 2, 3, 6, 7. (It is a coincidence that the farmer debtor petition in *Kalb* v. *Feuerstein,* 308 US 433, was filed in the federal court in the Wisconsin case on the same day. This is but one of the many striking likenesses of the two cases.)

5. Fourteen days thereafter on October 16, 1934, while the Sec. 75 (a) to (r) case 11200 was pending in the federal court, the state court entered judgment in foreclosure of the second mortgage to the Peoples Bank. Ex. 9.

6. On January 24, 1935, while the Sec. 75 (a) to (r) 11200 case still was pending, the state court issued execution for sale of the real estate in foreclosure. Ex. 10.

7. On February 21, 1935, the appellant who had failed to reach agreement with his creditors filed his amended petition in the federal court in the same case 11200, under the first Sec. 75 (s). Ex. 11.

8. On May 27, 1935 the procedure under this first Sec. 75(s) was knocked out by the decision of unconstitutionality of Sec. 75(s) in *Louisville* v. *Radford,* 295 US 555.

9. On August 6, 1935 this 75(s) case 11200 was dismissed. Ex. 2.

10. On August 28, 1935, the new Sec. 75(s) was enacted.

11. On April 25, 1936, the state court in its foreclosure case 12534 issued a new order of sale, but it was returned without execution on June 5, 1936. Ex. 1.

12. On October 7, 1937 the appellant moved in the federal court for reinstatement of his case 11200 which was denied on October 18, 1937. Ex. 2.

13. On January 26, 1938 the state court in foreclosure case 12534 entered its judgment and decree of foreclosure to the Federal Land Bank on its first mortgage. Ex. A.

14. Two days thereafter on January 28, 1938, the appellant filed in the federal court in Case No. 14344 a new petition for composition or extension under Sec. 75 (a) to (r) which was approved and referred to conciliation commissioner Rice. Ex. 12, 13, 14.

15. On January 31, 1938 while the new federal court case 11344 was pending, the state court in the foreclosure

case 12534 issued another order of sale under which an appraisement was returned. Ex. 16.

16. On March 2, 1938, agreement with creditors having failed in the new Sec. 75(s) case 14344 the appellant filed his amended petition in the same case under the new Sec. 75(s) which was referred to conciliation commissioner Rice. Ex. 17, 18, 19.

17. On March 3, 1938 the Federal Land Bank moved in the federal court case 14344 to dismiss the proceeding. Ex. 3.

18. On March 9, 1938 conciliation commissioner Rice issued and served upon the sheriff, the judge and attorneys for the Land Bank in the state foreclosure case 12534 notice of the exclusive jurisdiction of the federal court and a restraining order against any procedure in foreclosure. Ex. 20, 21.

19. On March 12, 1938, the sheriff sold the real estate in foreclosure case 12534 and two days later on March 14, 1938 reported sale to the Peoples Bank, holder of the second mortgage.

20. On October 10, 1938 the federal court dismissed the 75(s) case 14344. Ex. 3. Ex. C.

21. On November 16, 1938 the appellant filed his petition for a rehearing of the dismissal of case 14344. Ex. 3. Ex. D.

22. On December 17, 1938 the state court confirmed the sale in foreclosure in case 12534 and the sheriff issued a deed to the cashier of the Peoples Bank. Ex. 22.

23. On January 11, 1939 the petition for rehearing of the dismissal order was denied by the federal court in case 14344. Ex. 3. Ex. D.

RESPONSE TO ATTORNEY KNAPKE'S SEPARATE GROUNDS OF THE STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS.

This response to Attorney Knapke's separate grounds will follow the order of his Statement from its beginning.

I.
First Paragraph of Mr. Knapke's Statement.

In which, after stating the foreclosure petition was filed in the state court before the farmer debtor petition was filed in the federal court it is concluded that:

> "The voluntary dismissal by Wenning of the entire proceedings under # 75, 11 USCA # 203, on August 6th, 1935, rendered such proceedings, nugatory and the conditions were then the same as if such proceedings were never instituted in the Federal Court."

The quoted statement is not true as a matter of law. It is true that the petition seeking foreclosure in the State Court was filed before the farmer debtor petition 11200 was filed in the United States Court under the federal statute. This farmer debtor *petition* was for composition or extension pursuant to subsections (a) to (r) of that statute and ran its full course without dismissal.

But while that farmer debtor *petition* under Sec. 75 (a) to (r) *was pending* in the United States Court the State Court purported to render a judgment and decree in foreclosure in favor of the Peoples Bank which held a second mortgage. This was an absolute nullity by the express provisions of Section 75 (a) to (r), namely subsections (n) (o) and (p) [T 11, USC 203 (n) (o) and (p)], under which

the farmer debtor *petition* was pending. As was categorically stated sixteen times by this court unanimously in *Kalb* v. *Feuerstein,* 308 US 433, the state court judgment and decree in foreclosure was absolutely void—a nullity.

The dismissal referred to was of an *amended petition* filed under another federal statute, the original Sec. 75(s) [T 11 USC 203(s)], above referred to, which provided for additional procedure after the procedure under Section 75 (a) to (r) should be finished. This subsection (s) had been enacted June 28, 1934 MORE THAN 15 MONTHS AFTER the enactment of Sec. 75 (a) to (r).

Promptly on February 21, 1935, after the completion of the procedure under Sec. 75 (a) to (r), the appellant filed his *amended petition* in case 11200 as required under that 75 (s) and was adjudicated a farmer debtor bankrupt.

Thereafter on May 27, 1935 this Court in *Louisville* v. *Radford,* 295 US 555, held that first subsection (s) to be unconstitutional and thereby the farmer debtor *amended petition* under subsection (s) was completely out of court and the appellant requested that his adjudication as a farmer debtor bankrupt under subsection (s) be vacated and his amended petition dismissed and the court complied.

But neither the proceeding under the invalid subsection (s) nor the decision in *Louisville* v. *Radford,* 295 US 555, effected the preceding proceeding under subsections (a) to (r). The decision in *Louisville* v. *Radford,* 295 US 555, holding subsection (s) to be unconstitutional did not relate to subsections (a) to (r) nor effect their validity and therefore subsections (n) (o) and (p) stood without impairment in full force, and the judgment and decree of the state

court in foreclosure remained a nullity, as it was when the judge purported to issue it.

The state court was by the effect of *Louisville* v. *Radford,* 295 US 555, restored to its jurisdiction in foreclosure as of the date of the completion of proceedings under subsections (a) to (r). But the proceedings under the still existing and unimpaired statute, Sec. 75 (a) to (r), a separate and distinct statute which was never held to be unconstitutional, were not effected and the effect of subsections (n) (o) and (p) in rendering the foreclosure judgment and decree an absolute nullity STILL REMAINS. Reassumption of jurisdiction in the State Court could not put life into what never had life.

The farmer debtor proceeding which was involved in *Kalb* v. *Feuerstein,* 308 US 433 was filed in the United States Court in Wisconsin on the same date the Wenning farmer debtor petition was filed in the United States Court in Ohio, that is on October 2, 1934. The 75 (s) proceeding in the *Kalb* case fell a victim to the same decision of this Court in *Louisville* v. *Radford,* 295 US 555, and was dismissed for the same reason that Wenning's case was dismissed. It was under such identical circumstances that this court in *Kalb* v. *Feuerstein,* 308 US 433, held all proceedings in the State Court which were conducted while the farmer debtor petition under Sec. 75 (a) to (r) was pending to be absolute nullities, a decision that fits this *Wenning* case like a glove.

It is therefore false to say as noted above that: "The voluntary dismissal by Wenning of the entire proceedings under # 75, 11 USCA # 203, on August 6, 1935, rendered such proceedings nugatory and the conditions were then

the same as if such proceedings were never instituted in the Federal Court." for the purported judgment and decree in foreclosure remained as when promulgated, a nullity as in the *Kalb* case.

II.

Second Paragraph of Mr. Knapke's Statement.

Anent the judgment to the Federal Land Bank, holder of the first mortgage, on January 26, 1938.

This judgment was valid because the state court then had unimpaired jurisdiction as had been repeatedly stated in arguments and briefs on behalf of the appellant at every stage of this case from its inception. It is a valid judgment to this day but its validity has no bearing on the issue now before this Court.

III.

Third Paragraph of Mr. Knapke's Statement.

That on October 10, 1938 the United States Court dismissed the farmer debtor (in Case 14344) and ordered all stay orders "set aside and held for naught".

To properly comprehend the intended import of the foregoing statement it is advisable to explain the further history of the attempts of the appellant to save his farm.

On August 28, 1935, following this Court's holding of invalidity of the first subsection (s), a new subsection (s) had been enacted which this court unanimously held to be constitutional in *Wright* v. *Vinton,* 300 US 440. After that decision the appellant applied to the United States Court to have his farmer debtor case 11200 reinstated but was denied. It was after his failure to have his farmer debtor case 11200 reinstated that the Federal Land Bank judgment was taken on its first mortgage.

Two days after that judgment and decree of foreclosure was taken, that is on January 28, 1938 the appellant filed another farmer debtor petition in the federal court in case 14344 which he had a right to do. *Wragg* v. *Federal,* 317 US 325, 328; *Re Boyer,* 138 F. (2d) 349, CCA 8; *Feuerstein* v. *Kalb,* 127 F. (2d) 509, CCA 7; *Howell* v. *Federal,* 92 F. (2d) 703, CCA 9. This new petition under subsections (a) to (r) for composition or extension went through the complete procedure provided by those subsections and again the creditors refused to agree. It was during this procedure, despite the plain terms of subsections (n) (o) and (p), that the state court issued its order of sale as provided by the General Code of Ohio section 11588 that "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered." That is, the state court considered GC 11588 of Ohio as valid though it was clearly repugnant to sec. 75 (T 11 USC 203). *Kalb* v. *Feuerstein,* 308 US 433.

In further pursuance of the Ohio law and in defiance of the United States statute the appellant's property was appraised and the appraisement returned and filed in the state court in preparation for sale in foreclosure. The dismissal order in 14344 referred to in the third paragraph of Mr. Knapke's state-

ment was not entered until after all procedure under the petition for Composition or Extension under subsections (a) to (r) had been completed. Thereafter, pursuant to the new sec. 75(s) the appellant filed his amended petition in Case 14344 under which he was adjudicated a farmer debtor bankrupt and his case was referred to conciliation commissioner Rice for administration. The conciliation commissioner issued and served a restraining order upon the judge of the state court, upon the sheriff, and upon attorneys for the Federal Land Bank giving notice of the exclusive jurisdiction of the United States Court and restraining the judge, the sheriff and the Federal Land Bank from taking any action in the State Court. Ex. 20, 21. Despite this restraining order the sheriff purported to conduct the sale and report to the State Court that he had sold the real estate to the Peoples Bank Company, one of the appellees herein.

It was seven months thereafter, on October 10, 1938, that the order of dismissal in Case 14344 was entered by the United States Court granting a motion which had been filed by the Federal Land Bank *after the amended petition* under subsection (s) was filed in the United States Court.

This order of dismissal was erroneous as this Court unanimously held in *John Hancock* v. *Bartels,* 308 US 180, where Chief Justice Hughes for the court said,

> at page 183: "We think that the District Judge failed to follow the mandate of the statute" . . .; at pages 183-184: "Subsection (s) of Sec. 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors" . . .; page 184: "The subsections of Sec. 75 which regulate the procedure in relation to the effort of a farmer debtor to obtain a composition or extension

contains no provision for a dismissal" . . .; at page 187: "The scheme of the statute is designed to provide an orderly procedure so as give whatever relief may properly be afforded" . . .; at page 187: "We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe."

This court again held that a District Court could not dismiss a farmer debtor proceeding in *Wright* v. *Union Central,* 311 US 273, where the unanimous court, opinion by Justice Douglas, held that the statutory procedure must be followed.

Again in *Wright* v. *Logan,* 315 US 139, this court unanimously held, opinion by Justice Black, that a farmer debtor case could not be dismissed but must be administered as prescribed by the statute.

Without saying so, it would seem that Mr. Knapke's words in the third paragraph of his Statement that "all stay orders heretofore entered hereunder are set aside and held for naught" imply that the conclusion shall be that all of the said procedures, in defiance of subsections (n) (o) and (p), were thereby endowed with a life and effectiveness they never had. *Kalb* v. *Feuerstein,* 308 US 433. These proceedings were (1) the void order of sale on January 31, 1938 and (2) the appraisement on February 8, 1938, both during the pendency of the petition in 14344 under subsections (a) to (r) and occurring only a few days after its filing.

Apparently it is intended that it shall also be concluded that the void proceedings in the state court during the pendency in the federal court of the amended petition in

14344 under subsection (s) were likewise endowed with life by such dismissal. These state court proceedings were (3) the sheriff's sale and (4) his report, conducted and filed not only in defiance of the exclusive jurisdiction of the federal court but in defiance of the specific notice and restraining orders issued by the federal court which had been issued and served upon sheriff, judge and attorneys for the Federal Land Bank three days prior to the purported sale. Ex. 20, 21.

The order of dismissal of the Sec. 75(s) amended petition in 14344 was not entered until October 10, 1938—seven months after the sale! So it all boils down to this:

"Absolutely Essential Prerequisites"

In support of the text of the paragraph beginning at the lower part of page 13, the following is quoted:

27 Ohio Jurisprudence, "Mortgages" section 522, page 696: "*A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. By the express command of the Code, when a mortgage is foreclosed a sale of property shall be ordered;*" General Code of Ohio, section 11,588. Emphasis supplied.

24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17: "A judicial sale has its *very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act.* Furthermore, purchasers at a judcial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but the order must be made prior to the sale." Emphasis supplied.

sequently a federal court will disobey the federal law by dismissing the case.

This can not be. Even where a court exercised its authority under an act [the original 75(s)] subsequently declared to be unconstitutional this court held that such exercise was judicial or ministerial and therefore valid. *Adair* v. *Bank,* 303 US 350, opinion by Justice Reed. That is, even the declaration of unconstitutionality of a federal statute did not ex post facto undo what had been done under it.

Here both 75(a) to (r) and the new 75(s) were constitutional. There was never any dismissal of the 75 (a) to (r) proceeding in case 14344 under which, by subsection (n) (o) and (p), the order of sale and appraisement were utterly void. *Kalb* v. *Feuerstein,* 308 US 433.

Here also the sheriff's sale and report were in defiance of the court's restraining order served on judge, sheriff and attorneys for the Federal Land Bank. Ex. 20, 21. Let us examine what follows if the implied theory of "dismissal undoes prior orders ex post facto" is the law. Suppose in a divorce case the court issues an order and punishes by imprisonment one who disobeys that order and subsequently the court dismisses the case. May the prisoner then sue for false imprisonment—and whom shall he sue, judge, party, counsel, sheriff, clerk?

To imply that because the federal court dismissed a case pending under one statute [subsection (s)], such dismissal could activate utterly void proceedings, under another statute, so adjudicated by this court (*Kalb* v. *Feuerstein,* 308 US 433) and could also activate other proceeding in the dismissed case performed in defiance of a court re-

straining order issued, served and defied seven months previously, is contrary to law *and* fact. The assertions and implications involved in the third paragraph of Mr. Knapke's statement neatly point up the drawing in question of the validity of a United States statute, a decision against its validity, the validity of a state statute as repugnant to the Unted States statute and a decision favoring its validity.

IV.

Fourth and Fifth Paragraphs of Mr. Knapke's Statement.

Which read: "On December 17th, 1938, the Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said real estate to the purchaser, as the result of a sale held by the sheriff on March 12th, 1938, and Joseph G. Wenning did not have a federal case pending in bankruptcy at that time. The state court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked. (*Robertson v. Howard*, 229 U. S. 254)

In the case of *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 310 U. S. 1, the court said: 'The sale was, however, incomplete until confirmation by the Court. Until confirmation it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceedings were pending. The termination of the bankruptcy proceedings restored the jurisdiction and power of the State Court . . . Although the State Court's jurisdiction was suspended by that of the bankruptcy court it again attached upon the dismissal of the bankruptcy case,

and, thenceforward, as respects the foreclosure suit, and the State Court's proceedure, it was as if no bankruptcy case had ever existed'.

After discussing the actions of the State Court in the *Byerly* case, the court in its opinion said:

> 'If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding'."

(End of quotation from Mr. Knapke's statement.)

There is some question whether the State court had jurisdiction when it entered a confirmation of the purported sale. This is true because a petition for rehearing of the order of dismissal of case 14344 by the federal court was then pending in the federal court which was not denied until the following month. Ordinarily the pendency of a petition for rehearing of an order suspends the entry of the order and it does not become effective until the petition for rehearing is denied and ten days thereafter. Rule of Civil Procedure 63(a) which was then in effect and based on long-standing law. This would make the entry of dismissal effective January 21, 1939, ten days from the denial of the petition for rehearing, which date was *more than a month after the order of confirmation of sale by the state court.* That is, the farmer debtor proceeding in case 14344 under subsection (s) was still within the exclusive jurisdiction of the federal court when the state court presumed to confirm the void sale.

Robertson v. *Howard*, 229 US 254, cited in Mr. Knapke's Statement above quoted, was in *general bankruptcy,* not a farmer debtor case under Sec. 75, (a very different statute) in which the federal court had exclusive jurisdiction

at all times and the referee in bankruptcy, an officer of the bankruptcy court, had full *power* to order and conduct a sale of the property within the bankruptcy court's exclusive jurisdiction. Sec. 75 (11 USC 203) deprived the state court of all power to act in any way while a farmer debtor proceeding pends in a federal court. The referee in the general bankruptcy case did in the wrong way what he had full power to do and the remedy was by review in the same case. In other words there could be no collateral attack against his erroneous exercise of his power. But a state court has no POWER when a farmer debtor case is pending in a federal court. For example *Kalb* v. *Feuerstein*, 308 US 433, (which was on appeal from the State Supreme Court to this Court) originated in the state court as a collateral attack upon foreclosure proceedings in the Wisconsin state court, no review ever having been sought in the foreclosure case. Likewise in *Wright* v. *Union Central*, 304 US 502, (opinion by Justice Reed) *two* decisions of courts of last resort of Indiana were disregarded. *Exclusive jurisdiction* in the federal court means that a state court has no POWER and all procedure in a state court is nothing—a nullity—and is subject to collateral attack.

Union Joint Stock Land Bank v. *Byerly*, 310 US 1, is not on even "two-fours" with this case. There the federal judge by his formal order, in a case pending in the federal court under Sec. 75, expressly directed the state court to proceed with sale in foreclosure (on the creditor's plea that expense had been incurred in advertising it before the federal jurisdiction had been attached). This Court recognized that such an order was an error occurring within the exclusive power of the federal court, but held that

the state court was justified in taking it for granted that the federal judge knew federal law and that the sale could properly proceed. It further held that the federal judge, though having POWER, granted in Sec. 75 (o), to authorize state court action in the pending foreclosure, had not pursued the proper proceedure in granting it. Therefore, said the majority, the erroneous order of the district court was subject to correction by review, but it was not void because he had POWER to act and therefore was not subject to collateral attack.

Even so three justices (namely Justices Black, Douglas and Murphy) in their dissenting opinion of more than six pages open and closed their dissent with the statements 1 that the effect of the majority decision "would be largely to defeat the purposes of the Act" (page 11) and 2 that it provided "a ready means of circumventing the Act." (page 16).

It is clear that the attempt in the Wenning foreclosure by the state court to confirm what were utterly void proceedings—*i.e.* nullities—was itself based upon that court's conception that a state statute repugnant to a federal statute was valid and the decision of the state court in confirming the sale was a holding that the federal statute was invalid.

RESPONSE TO THE IDENTICAL GROUNDS OF THE TWO STATEMENTS AGAINST JURISDICTION AND MOTIONS TO DISMISS BY ATTORNEYS KNAPKE AND REISER.

V.

Such identical grounds in the two motions read as follows in each motion:

> "In the decisions as rendered by the State Courts (Common Pleas; Court of Appeal and Supreme Court) there were no decisions against the validity of any of the numerous statutes of the United States that are numbered and quoted in the statement in support of jurisdiction, as had been filed by the appellant herein.
>
> In none of the opinions in the State Courts as decreed, was there drawn in question the validity of a state statute of Ohio on the ground of its being repugnant to the Constitution or laws of the United States and the decision in favor of the validity of the state statute.
>
> WHEREFORE: As the decision of a federal question was not necessary to the judgments rendered and was not made the ground of such judgments, the respondents move that the appeal of Joseph G. Wenning be dismissed for want of jurisdiction."
>
> (End of quotation from statement and motions of attorney Knapke and attorney Reiser.)

The petition (fol. 43), , (the "Second Amended Petition" filed February 28, 1948) complains that the state court judgment to the Peoples Bank, the

execution thereon, the order of sale, appraisement, and the sheriff's sale were severally null and void because they were in violation of the laws of the United States, naming them specifically, and contrary to the Constitution of the United States enumerating the various proceedings in the United States Court based upon said federal statutes and their application to the state proceedings.

The Common Pleas Court was of the opinion (fol. 65), , that the interdicted acts of the Common Pleas Court were "ministerial procedural acts under the Statutes of the State of Ohio" thus putting the case squarely in line with the procedures in the Wisconsin state foreclosure case involved in *Kalb* v. *Feuerstein*, 308 US 433.

Also the opinion held that the state statutes provide "that the Court" . . . "examine the proceedings of its officers, and if found to be in accordance with the statutes, shall confirm same and order a deed."

The opinion further queried whether if any of the acts of the state court were "irregular or void, do not the Ohio statutory provisions which provide for the procedure provide that it is the Court of this state which shall make the determination as to the validity of those acts?"

Also: "if the" [state] "Court did commit error, the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error." [in the state court].

And again: "There has been no conflict in this case with either Federal Law or the Constitution of the United States."

And: "The Courts ruling on the motion" [for a new

trial] "was a final order from which plaintiff could have appealed but he did not do so."

The foregoing extracts demonstrate that the decision of the Common Pleas Court was squarely against the validity of the United States statutes which were drawn in question.

They demonstrate that the validity of the state statutes were drawn in question on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of the statute statutes.

No question was decided except the federal question which was held to be decisive thus dispensing with the consideration of other matters. The opinion concludes with the statement that "In view of the Court's finding it is not necessary to make a determination of other matters". . . .

The Court of Appeals of Ohio affirmed the Common Pleas Court holding in its opinion, in somewhat different language, precisely the same as the opinion of the Common Pleas Court.

The Supreme Court of Ohio, without opinion, merely dismissed the appeal as of right on the ground that "no Constitutional question is involved" and denied the motion to direct the Court of Appeals to certify the record for review.

It is not asserted on behalf of appellant that the state statutes relating to foreclosure and the enforcement of a lien were wholly invalid under all circumstances and for every purpose. It is asserted that as to the state of facts set out in the petition and evidence those state statutes were invalid because repugnant to the Constitution of the

United States and the laws of the United States made in pursuance thereof. As the state courts applied to the disadvantage of the plaintiff-appellant, and to his grevious injury, those state laws as being valid in application to facts and circumstances coming under the federal statutes the cause is appealable under T 28 USC 1257, paragraph 1. [Formerly Judicial Code section 237(a)]. *Dahnke-Walker* v. *Bondurant*, 257 US 282, 289-290.

Wherefore the appellant prays that the motion of the appellees be denied for the reason that clearly this court has jurisdiction and in the words of this Court in *Murdock* v. *Memphis*, 20 Wallace (87 US) 590, "must hear the case on its merits"; to prevent the state courts "from impairing or frittering away the authority of the federal government", *Missouri* v. *Andriano*, 138 US 496; "to maintain the supremacy of the Constitution and laws of the United States", *Harkrader* v. *Wadley*, 172 US 148; "to secure the independence of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every state" (not one construction for Wisconsin, another for Ohio); and to exercise its revising power to the end that its decisions shall be "final and obligatory on all other judicial tribunals, State as well as federal", *Green* v. *Neil*, 6 Peters (31 US) 291.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for appellant,
Joseph G. Wenning.

Lima, Ohio
August 5, 1950